COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2015-SC-000465-D
(2014-CA-001050)

ALEX ARGOTTE, M.D. — APPELLANT

v.

McCracken Circuit Court
2008-CI-01512

JACQULYN G. HARRINGTON — APPELLEE

BRIEF FOR APPELLANT, ALEX ARGOTTE

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CERTIFICATE OF SERVICE

I hereby certify that ten (10) originals of the foregoing have been served via Federal Express upon: **Susan Stokley Clary, Clerk of the Supreme Court of Kentucky**, State Capitol, Room 209, 700 Capital Avenue, Frankfort, Kentucky 40601; and that a true and correct copy of the foregoing has been served by regular mail upon: **Samuel Givens, Jr., Clerk of the Kentucky Court of Appeals**, 300 Democrat Drive, Frankfort, Kentucky, 40601-9229; and a true and correct copy of the foregoing has been served by regular U.S. mail upon: **Hon. Craig Z. Clymer,** Circuit Court Judge, Division II, McCracken Circuit Court, P.O. Box 1455, Paducah KY 42003; **Clifton A. Boswell, Esq.**, Clifton A. Boswell, PLC, 1402 East 4th Street, Owensboro KY 42303, and **Charles S. Wible, Esq.**, Charles S. Wible Law Offices P.S.C., 324 St. Ann Street, Owensboro KY 42302, *Attorneys for Appellee*; this 5th day of April, 2016. I further certify that the record on appeal was not withdrawn by Appellants.

James A. Sigler

INTRODUCTION

This is a medical malpractice case in which the trial court granted a directed verdict for the defendant after opening statement on the plaintiff's claim of lack of informed consent, because the plaintiff's counsel told the jury that (1) she had signed a written consent form identifying generally the complication at issue; and (2) she had no expert testimony to support her claim.

STATEMENT CONCERNING ORAL ARGUMENT

Appellant believes that oral argument may be helpful to the Court in clarifying the events before the trial court and the application of the legal doctrines at issue to the circumstances of this case.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

In this medical negligence action the patient, plaintiff/Appellee Ms. Harrington, admitted in her opening statement that she executed a written consent form for the surgical procedure at issue that revealed a broad range of potential risks, including the complication that allegedly ensued. The question is whether expert testimony was then necessary to show that the defendant/Appellant, Dr. Argotte, did not inform her sufficiently to satisfy the standard of care, in spite of her written consent. After Ms. Harrington's opening statement and before the taking of proof began, the trial court determined as a matter of law that expert proof would be necessary under these circumstances. Repeatedly assured by Ms. Harrington's counsel that no expert proof would be offered, the trial court directed a verdict in Dr. Argotte's favor.

Harrington had been the first to proclaim a need for expert testimony in this case. In written discovery, she stated an inability to identify Dr. Argotte's alleged negligence without the assistance of an expert. (R. at 14 – 16, 24). She later disclosed Dr. Ralph Silverman as her expert and presented him for deposition. (R. 449 – 51; R. No. 3: Deposition of Ralph Silverman, M.D.).

Dr. Silverman opined regarding informed consent. (R. No. 3, pp. 37 – 39, ll. 12 – 5). He supported Dr. Argotte's care:

> Q. I'm going to show you what I understand to be the consent to surgery signed by Ms. Springfield, now Harrington, for the vena cava filter and ask if the list of risks is an appropriate list of risks in this case.
>
> A. Everything is on here except for the fracture of the filter.
>
> ***

Q. Is it your opinion that a physician should tell a patient that fracture of the filter is a potential risk of this surgery?

A. I think migration is good enough. I don't think it's negligence or a lack of patient responsibility or patient duties to list fracture. I think migration takes care of that.

Q. And am I correct that migration of the filter is listed on this form?

A. Yes.

(R. No. 3, pp. 38 – 39, ll. 18 – 5).

Following this deposition, Harrington never withdrew Dr. Silverman as a witness. She never supplemented her discovery responses to modify her claim that expert testimony would be necessary in order to identify Dr. Argotte's alleged negligence. (*See* R. at 14 – 16). She never modified her disclosure of Dr. Silverman as her expert and she never disclosed any change in his opinions. (*See* R. No. 3, p. 48, ll. 1 – 9).

As trial approached, it was not clear whether Harrington would pursue theories of negligence, other than informed consent, using her disclosed expert, Dr. Silverman. This changed with Harrington's opening statement. Before the jury and on the record, Harrington, through counsel, declared without limitation that she was limiting her claim solely to one for alleged failure to sufficiently inform of the risks of the placement and retention of a retrievable vena cava filter; admitted that she had executed a written consent form for the procedure; admitted that the consent form disclosed risks; and declared that she would offer no expert testimony in support of her case. In addition to displaying for the jury an enlarged exhibit of the signed written consent form (VR 3/17/14 1:56:22 – 1:59:08 p.m.), her counsel declaring:

> This trial is … about … the vena cava filter and procedure; and it's more specifically about lack of informed consent – lack of informed consent with respect to implantation of the vena cava filter.

(VR 3/17/14 1:49:09 – 1:49:28 p.m.).

> Some of you may be asking: "Did Jackie Harrington sign a consent form?" And the answer is: "Yes; she did." She did sign a consent form, and we're going to present that to you.

(VR 3/17/14 1:51:02 – 1:51:11 p.m.).

> [T]his is the consent form that Jackie signed. The evidence will show that that is her signature on there….

(VR 3/17/14 1:57:05 – 1:57:12 p.m.).

> [The form, under "Physicians statement Risk"] lists a whole bunch of bad things that can happen if this filter is put in – a lot of bad things. Now one thing that is not on here is the word fracture or fragmentation. It's not on the consent form. The evidence will show that Dr. Argotte did not tell Jackie that there was a risk that the filter could fracture or fragment.[1]

(VR 3/17/14 1:58:36 – 1:59:08 p.m.).

> Now, Mr. Sigler has told you that … there is a doctor who is going to testify at this trial … named Dr. Gaar. And Dr. Argotte is also a doctor; and he is going to testify. He is also a medical professional that knows a lot about medical things, and it could be said of Jackie Harrington: "Well,

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[1] The consent form, a copy of which was being shown to the jury, stated on its face, in relevant part, as follows:

> I have been informed of the nature, risk, consequences, and alternatives of the operation or procedure to be performed.
>
> ***
>
> Physician statement Risk:
>
> …
>
> Migration of filter
>
> ***
>
> I have been made fully aware by Dr. Argotte and/or his staff of the procedure to be performed and I am now aware of the risks involved. … **Initial:** [JS]

(R. at 578 – 79, 582) (*See also* A. at 4: Consent to Surgery) (bold formatting in original).

> where's Jackie's doctor? Why didn't Jackie bring a doctor here to testify – to tell you, the jury, about what a doctor should have told her?" And, folks, you all know; you don't need a doctor to tell you what Jackie needed to know about this procedure. You can use your own common sense and decide for yourself what a person in Jackie's shoes should have been told; and you can decide whether she was told or not. So, you are going to be asked to use your own common sense to make that decision.

(VR 3/17/14 2:13:50 – 12:14:15 p.m.).

Harrington further acknowledged via her counsel's opening statement that at least some conversation took place with Dr. Argotte about the placement of the filter; but she claimed that Dr. Argotte never personally went over the written consent form with her. (VR 3/17/14 1:59:22 – 2:00:26 p.m.). Harrington also informed the jury that the medical records would reflect and Dr. Argotte would presumably testify that Harrington was given options as to the placement of the filter and was informed about the risks and benefits; however, counsel informed the jury that Harrington would dispute these claims. (VR 3/17/14 2:03:44 – 2:05:18 p.m.).

At the close of plaintiff's opening statement, Dr. Argotte moved the Court for a directed verdict, arguing that expert testimony would be necessary in order to prove a breach of the standard of care with regard to obtaining informed consent. (VR 3/17/14 2:37:47 – 2:39:46 p.m.).[2] For nearly the next hour (VR 3/17/14 2:44:24 – 3:44:51 p.m.),[3] the Court heard argument, worked on an analysis of the situation with counsel,[4] and

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[2] The motion was repeated outside the presence of the jury so that a better record could be made. (VR 3/17/14 2:42:09 – 2:44:24 p.m.).

[3] This time period included a recess taken by the Court from 3:30:18 p.m. to 3:40:02 p.m. (on the video record of 3/17/14) to allow Harrington's counsel an opportunity to review authority and formulate additional arguments.

[4] Many times during the arguments, the Court sought to explain, or clarify, with counsel how it understood the situation, the contentions and the authorities and to engage counsel in an effort to properly analyze and

provided opportunity for and encouraged Harrington's counsel to engage in further research and development of arguments, if any there might be.[5]

During the course of these exchanges, Harrington made one thing patently clear: she was standing, and falling, by her decision to proceed without an expert.

> **Harrington's counsel: There's no question, Judge. There's not going to be an expert.**

(VR 3/17/14 3:10:20 – 3:10:22 p.m.) (A. at 5, Excerpts from Video Record).

> **Harrington's counsel: If that's going to be your ruling, Judge, [that expert proof is necessary] then there's no point to go on. If your mind is made up on that – I don't want you to enter directed verdict, but I would rather it be now, than two days from now.**

(VR 3/17/14 3:12:49 – 3:13:01 p.m.) (A. at 5).

Ultimately, the Court, under the particular circumstances presented, directed verdict in favor of Dr. Argotte. (VR 3/17/14 3:44:51 – 3:46:03 p.m.). The findings and analysis underlying this decision, as well as further insight into the facts, are best captured in the Court's thorough, written decision granting directed verdict. In this order, the Court explained:

> This action came before the Court on March 17, 2014, for trial by jury. … Both parties, represented by counsel, announced ready; and the Court proceeded with jury selection. … At the close of plaintiff's opening statement, Defendant moved for directed verdict pursuant to CR 50.01 and the Court's authority as recognized in cases such as *Lambert v. Franklin Real Estate Co.*, 37 S.W.3d 770, 774 (Ky. App. 2000) ("… Kentucky cases recognize the power of a trial court to decide a case upon the opening statements of counsel where they clearly and definitely disclose

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resolve the matter. (*See* VR 3/17/14 2:50:40 – 2:53:43 p.m.; 2:55:00 – 2:56:08 p.m.; 2:56:08 – 3:00:15 p.m.; 3:03:06 – 3:04:22 p.m.; 3:11:59 – 3:12:47 p.m.; 3:13:54 – 3:15:29 p.m.; 3:17:13 – 3:18:17 p.m.; 3:19:50 – 3:21:44 p.m.; 3:23:20 – 3:23:43 p.m.; 3:24:33 – 3:25:25 p.m.). Excerpts from these exchanges are set forth in the Appendix. (*See* A. at 5).

[5] *See* VR 3/17/14 3:02:45 – 3:04:45 p.m.; 3:09:50 – 3:10:20 p.m.; 3:11:42 – 3:12:05 p.m.; 3:13:02 – 3:13:39 p.m.; 3:21:45 – 3:21:51 p.m.; 3:28:09 – 3:28:51 p.m.; 3:41:03 – 3:41:13 p.m.

no cause of action or no defense, or admit facts the existence of which precludes a recovery by their clients."). For reasons set forth below, the motion is GRANTED.

In response to the Court's pre-trial order Plaintiff identified no expert witness to testify in support of her action; and, during opening statement, Plaintiff, through counsel, confirmed that no expert would testify in support of her cause of action. Further, Plaintiff confirmed during opening statement that her action was limited to a claim of an alleged failure to obtain informed consent for the medical procedure in question and made admission that Plaintiff had signed a written informed consent for the placement of a vena cava filter. A copy of the informed consent document signed by the plaintiff was made part of the record.

In response to Defendant's motion for a directed verdict, the Court provided opportunity for the parties to produce legal authority and to make arguments to the Court. Thereafter, the Court, having considered the admissions made, the facts presented or likely to be presented by the action as reflected in the Court file and the arguments of counsel, and being sufficiently advised, found that the admissions by Plaintiff in her opening statements, even construing the facts and matter most favorably to Plaintiff rendered it impossible to reach a verdict against Defendant as a matter of law.

This case revolves around the placement of a retrievable vena cava filter in advance of a scheduled gastric bypass surgery. Plaintiff is critical of the depth, degree and/or sufficiency of the information she was given about the procedure in question; and, in arguing against directed verdict, her counsel represented that she would testify that she was given absolutely no information about the procedure. However, Plaintiff stipulated that she signed a written consent for the procedure. This was admitted by her counsel in opening statement and the display of the signed consent form to the jury. This is not a case where the patient was given *no* information about the procedure in question. *See Keel v. St. Elizabeth Med. Ctr.*, 842 S.W.2d 860 (Ky. 1992); *Hawkins v. Rosenbloom*, 17 S.W.3d 116 (Ky. App. 2000).

As such, in this case, expert testimony in the form of a physician testifying is required, unless one of the recognized exceptions to the expert-witness rule for medical negligence cases could apply and the Court finds that no exception applies. Plaintiff's only contention was that the jury could decide the present case without the assistance of expert testimony. The Court, however, finds otherwise, and finds that there is no reasonable basis for contending that expert testimony would be unnecessary in this action. Plaintiff abandoned her expert and narrowed

her theory only weeks before the trial. The issues concerning the depth, degree and/or sufficiency of the informed consent in this matter, however, are beyond the understanding of a lay jury. Specifically, as to the standard of care, expert testimony would be required in this matter to appropriately inform the jury as to what a reasonably competent surgeon in the same or similar circumstances would do.

Plaintiff's action actually turns on her claim that she was not told about certain specific risks relative to such filters or about options relating to subsequent removal or nonremoval of the filter. Specifically, Plaintiff claims she was not told that the filter could fracture, was not told the filter was retrievable, and was not told that Dr. Argotte did not have privileges to remove the filter (*i.e.*, that he would not be the one who could perform the retrieval). Plaintiff's complaint alleges that it was medical negligence not to give this additional information relative to the procedure. These contentions, however, require expert medical proof.

Plaintiff's admission establishes that she gave written informed consent for the procedure; and, under the circumstances presented, it was absolutely necessary for her to present expert testimony to establish and support her criticisms. She admitted that there was no expert support for her theory. Plaintiff failed to articulate an alternative basis for proceeding without expert testimony and confirmed for the Court that she had no intention (or request) to take an alternate course of action. The record in this action presents no alternative basis for proceeding without expert proof as there are no admissions by Defendant supporting the theory and the claim is not one which can be placed before a jury without expert testimony.

The Court determines that expert testimony is required in this matter and thus there is no reasonable basis for contending otherwise; and the Court being presented with no motion to amend or supplement the opening statement, no motion to continue the trial and no request to consider other proof, or to present evidence by avowal:

IT IS THEREFORE ORDERED that Defendant Alex Argotte, M.D.'s motion for directed verdict is GRANTED.

(R. at 581 – 84) (A. at 2, Order Granting Directed Verdict).

The Court of Appeals reversed, relying primarily on its analysis concerning the timing of the directed verdict motion.[6] The court acknowledged the long-standing Kentucky rule establishing the trial court's authority to direct a verdict after opening statement. Nevertheless, the court held that "[t]he language of CR 50.01 plainly contemplates the introduction of some evidence at trial before granting a directed verdict." In the court's view, "an opening and closing statement at trial does not constitute 'evidence.'" The crux of the court's decision is then found in the concluding paragraph of its analysis and in the accompanying footnote:

> In the case *sub judice,* the circuit court prematurely determined that expert testimony was required to demonstrate the standard of care and breach thereof by Argotte. In a medical negligence claim, the law recognizes an exception where expert testimony is unnecessary if the failure to disclose is so obvious that a layperson can recognize the necessity of such disclosure to a patient. The circuit court viewed this exception as only being triggered in cases where no consent was given by the patient. We disagree with this narrow limitation. Rather, the application of the exception is highly fact-specific and is dependent upon whether the failure to disclose is obvious and apparent to a layman based upon the underlying facts as established by the evidence introduced at trial. As no evidence was heard or introduced before the directed verdict was granted, the circuit court could not have properly determined whether the exception to the general rule requiring expert testimony was applicable.[1]
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> > [1] In considering a summary judgment motion, the circuit court may consider the facts as established by depositions and affidavits. However, when ruling upon a directed verdict, it is improper for the court to consider depositions and affidavits. *Riley v. Hornbuckle,* 366 S.W.2d 304 [(Ky. 1963)]. Rather, the circuit court must solely rely upon evidence introduced at trial, which, in this case, there was no evidence entered for the court to consider.

(Appendix Exhibit 1) (underline emphasis added).

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[6] Final disposition of this matter in the Court of Appeals was by Opinion rendered July 31, 2015. A copy of this Opinion is attached as Appendix Exhibit 4.

The court thus expanded the layman's exception to the expert-witness rule, effectively ruling that the mere possibility of this exception guarantees a jury trial in all cases, even without expert testimony.

ARGUMENT

There are two issues in this medical negligence action: one substantive and one procedural. The substantive question is whether, pursuant to *Keel v. St. Elizabeth Medical Center*, 842 S.W.2d 860 (Ky. 1992), expert testimony is necessary to establish Jacqulyn Harrington's failure-of-informed-consent claim, where it is undisputed that she signed a written consent that identified the complication in question without identifying all possible ramifications. The procedural question is whether the trial court could properly determine that expert testimony was necessary and direct a verdict for the defendant after opening statements, based on the plaintiff's judicial admissions that she had signed such a consent and that she had no expert to support her claim.

A. Harrington could not prove her claim without expert testimony.

Harrington's counsel made her position unequivocal: "There's no question, Judge. There's not going to be an expert." (VR 3/17/14 3:10:20 – 3:10:22 p.m.). At the conclusion of her opening statement or at the end of her case-in-chief, her evidence would have been the same. Therefore, the controlling question, as explained by the Court and as acknowledged by Harrington's counsel, was whether expert testimony would be necessary to establish the standard of care for informed consent where some information admittedly had been given and a written consent form had been signed.

The necessity for expert testimony is within the trial court's discretion. *Nalley v. Banis*, 240 S.W.3d 658, 661 (Ky. App. 2005) (*quoting Baptist Healthcare Sys., Inc. v. Miller*, 177 S.W.3d 676, 681 (Ky. 2005) ("A 'trial court's ruling with regard to the necessity of an expert witness [is] within the court's sound discretion.'"); *Hawkins v. Rosenbloom*, 17 S.W.3d 116, 120 (Ky. App. 2000) ("[T]he trial court did not abuse its discretion by refusing the allow the [plaintiffs] to present evidence to the jury regarding lack of informed consent without expert testimony."). Here, there was no legitimate dispute as to the need for expert testimony.

It is well established under Kentucky law that "a plaintiff alleging medical malpractice is generally required to put forth expert testimony to show that the defendant medical provider failed to conform to the standard of care." *Blankenship v. Collier*, 302 S.W.3d 665, 670 (Ky. 2010) (*citing Perkins v. Hausladen*, 828 S.W.2d 652, 655-56 (Ky. 1992). The same applies equally to the subset of cases alleging failure of informed consent. In the words of this Court: "As in any medical malpractice case, the general rule is that expert testimony is required to negate informed consent." *Hawkins v. Rosenbloom*, 17 S.W.3d 116, 119 (Ky. App. 2000) (citation omitted). *See also Holton v. Pfingst*, 524 S.W.2d 786, 788-89 (Ky. App. 1975); *Keel v. St. Elizabeth Med. Cntr.*, 842 S.W.2d 860, 862 (Ky. 1992); *Fraser v. Miller*, 427 S.W.3d 182, 187-88 (Ky. 2014) (Keller, J., Concurring).

Consistent with the above authority, Harrington originally maintained that expert testimony was necessary in order to identify Dr. Argotte's alleged negligence, and she had sought to provide such testimony. (R. 14 – 16). The problem for Harrington was not that she lacked time or inclination to seek out expert advice; the problem was that her

own expert told her, on the record, that there was no breach of the standard of care with regard to informed consent, given the written consent form she had signed. (R. No. 3: Deposition of Ralph Silverman, M.D., pp. 37 – 39, ll. 12 -5). Thus, for tactical reasons, Harrington sought a way around her own expert, and showed up at trial with a plan to ask the jury to find what her own expert had denied.

Kentucky law does not recognize such practices. No exception to the expert witness rule has ever been recognized by our courts where a written consent has been signed by the patient. This is true even where the patient denies recalling the physician's discussing the general risks of the procedure and testifies that the physician did not go over the form with him or her. *Hawkins*, 17 S.W.3d at 119; *see also Fraser*, 427 S.W.3d at 188 ("[U]nlike in *Keel*, wherein the plaintiff obtained no information, [plaintiff here] received and signed a general consent to treat when he presented as a patient at the urgent care center.") (Keller, J., Concurring); *Holton*, 534 S.W.2d at 789 (affirming directed verdict for physician even though written consent not obtained).

In *Keel v. St. Elizabeth Med. Cntr.*, 842 S.W.2d 860, 862 (Ky. 1992), this Court crafted the window for excusing expert proof in failure-to-inform cases narrowly. In that case, the Court allowed the case to proceed to the jury because there was evidence that "the patient was given no information about the procedure." *Keel*, 842 S.W.2d at 860. This fact, recited in the opening sentence of the Court's opinion, was pivotal to its holding:

> We must agree with [the defendant medical provider] that, in most cases, expert medical evidence will likely be a necessary element of the plaintiff's proof in negating informed consent. In view of the special circumstances of this case, however, we believe that neither *Holton* nor KRS 304.40-320 requires [the plaintiff patient] to produce expert

> testimony on this issue. ... Here, we find it significant that [the medical provider] offered [the patient] *no information whatsoever* concerning any possible hazards of this particular procedure.... In the present case, a juror might reasonably infer from the non-technical evidence that [the defendant's] utter silence as to risks amounted to an assurance that there were none, whereas its own questions to patients regarding reactions to this specific procedure demonstrate that [the defendant] itself ... recognized the substantial possibility of complications....

Id. at 862 (citations omitted) (italicized emphasis in original; underline emphasis added). Thus, it was the failure to offer *any information whatsoever*, combined with the hospital's own admission of the substantial risk involved, that allowed for the *Keel* court's conclusion that the failure to obtain informed consent was one that was "so apparent that laymen [could] easily recognize it or infer it from evidence within the realm of common knowledge." *Id.* (citations omitted). This is not the rule when the defendant medical provider has undisputedly offered the patient a written disclosure of the risks. The present case is simply not within the exception recognized in *Keel*.

The Court of Appeals' conclusion that *Keel* should be read more broadly, to allow removal of the expert requirement even in the face of the patient's written and informed consent, raises serious policy concerns:

> "The matters involved in the disclosure syndrome, more often than not, are complicated and highly technical. To leave the establishment of such matters to lay witnesses, in our opinion, would pose dangers and disadvantages which far outweigh the benefits and advantages a 'modern trend' rule would bestow upon patient-plaintiffs. In effect, the relaxed 'modern trend' rule permits lay witnesses to express, when all is said and done, what amounts to medical opinion. Undoubtedly, such a rule would cause further proliferation of medical malpractice actions in a situation already approaching a national crisis. This is a result which, if at all possible consonant with sound judicial policy, should be avoided. ...."

Keel, 842 S.W.2d at 867 (*quoting Bly v. Rhoads*, 222 S.E.2d 783 (Va. 1976)) (Sullivan, Ronald M., SJ, dissenting, joined by Stephens, C.J. and Spain, J.). Thus, the dissenters in

Keel were sufficiently disturbed by its implications that they would have maintained the expert requirement even in a case in which the doctor had given no information at all to the patient. Moreover, two justices of this Court (Keller, J., joined by Nobel, J.) have recently expressed the understanding that *Keel* is limited to situations "wherein the plaintiff obtained no information" and that its holding would not excuse expert proof where the patient had "received and signed a general consent to treat when he presented as a patient at the urgent care center." *Fraser v. Miller*, 427 S.W.3d 182, 188 (Ky. 2014) (Keller, J., Concurring).

Here, the record discloses not only the plaintiff's written consent, but also her original contention that expert proof would be necessary; her unwithdrawn intention to use Dr. Ralph Silverman as her expert; and Dr. Silverman's opinion that Dr. Argotte did conform to the applicable standard of care with regard to obtaining informed consent. Harrington essentially requests a rule that would allow a lay jury to assign medical negligence where her own retained, disclosed medical expert would not. As seen in the above cases, such a rule would conflict with the policy concerns addressed in the expert requirement followed in Kentucky and nationwide. *See also Holton v. Pfingst*, 534 S.W.2d 786, 788 (Ky. App. 1975) ("[T]he law has ... continued to afford the medical profession and other learned professions a privilege ..., and that is the freedom to set their own legal standards of conduct. The policy justification implicitly advanced is the respect which the courts have had for the learning of a fellow profession accompanied by reluctance to overburden it 'with liability based on uneducated judgment.'") (citation omitted)).

Even assuming for the sake of argument that Harrington would have testified at trial that she was told "nothing at all" or that she had been given the consent form in a stack of papers and felt rushed to sign it,[7] the fact remains that she admittedly did receive some information: a written disclosure addressing the very complication that later occurred. Therefore, under controlling legal precedent, the trial court was well within its discretion to conclude that Harrington would need expert testimony in order to establish her claim. As explained by the trial court, proceeding without an expert would leave the jury without information necessary to its decision and would merely invite the jury to assess liability simply on the fact of a "bad outcome." *See Andrew v. Begley*, 203 S.W.3d 165, 170 (Ky. App. 2006) ("The presumption of negligence is never indulged in from the mere evidence of mental pain and suffering of the patient, or from failure to cure, or poor or bad results.") (citation and internal quotation marks omitted). Again, this was not a "*res ipsa*" case in which the physician's failure was "so apparent that laymen may easily recognize it or infer it from evidence within the realm of common knowledge." *Keel* at 862, citing *Jarboe v. Harting*, 397 S.W.2d 775 (Ky. 1965)(doctor misdiagnosed pregnant patient as having a uterine tumor and admitted he should have performed a pregnancy test before surgery). Without expert testimony, the jury could not assess what the applicable standard of care required and, therefore, whether it was breached. Again, the point is illustrated by the fact that Harrington's own expert testified that fracture and migration of

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[7] This factual argument emerges for the first time in Harrington's brief on appeal,with citation to her deposition. Harrington did not offer this assertion to either the jury during her opening statement or to the Court during the nearly hour-long discussion of whether expert testimony was necessary. Rather, Harrington's argument to the Court was that Harrington would testify that she was told "nothing at all;" and the Court accepted this as true – to the extent it could do so given her other admissions. (*See* VR 3/17/14 2:50:40 – 2:53:43 p.m.; 3:23:20 – 3:23:43 p.m.) (A. at 5).

an inferior vena cava filter was one of the generally recognized risks of the placement of such a filter. (R. No. 3: Deposition of Ralph Silverman, M.D., p. 37, ll. 12 – 14). The trial court correctly determined that expert testimony was necessary; and a directed verdict was therefore proper.

B. The trial court did not err in directing a verdict for the defendant at the close of the plaintiff's opening statement.

The Court of Appeals held that the trial court could not properly determine whether expert testimony was needed until the close of the evidence. But Kentucky law has long recognized "the power of a trial court to decide a case upon the opening statements of counsel where they clearly and definitely disclose no cause of action ... or admit facts the existence of which precludes a recovery by their clients." *Lambert v. Franklin Real Estate Co.*, 37 S.W.3d 770, 774 (Ky. App. 2000).

The issue here is not truly one of timing. Indeed, Harrington effectively waived such an argument when her counsel invited the trial court to enter directed verdict "now, [rather] than two days from now" if the court was of the view that an expert was necessary. Harrington refused to offer her disclosed expert, Dr. Silverman, and though she had no other expert who would support her claim, she made no suggestion that she might correct the situation with a continuance and an extension on discovery. She never made a motion for either. Her counsel recognized that if an expert was necessary as a matter of law, then she was left with an undeniable "complete absence of proof on a material issue" and could not meet her burden to survive a motion for directed verdict.

The question, then, is whether entry of a directed verdict was proper on the admitted facts at hand, reviewing the legal issues *de novo* and granting the trial court the

deference it is due on those questions falling within its discretion. The Court of Appeals has summarized this Court's holdings as to the applicable standard of review as follows:

> When a directed verdict is appealed, the standard of review on appeal consists of two prongs. The prongs are: "a trial judge cannot enter a directed verdict unless there is a complete absence of proof on a material issue or if no disputed issues of fact exist upon which reasonable minds could differ." *Bierman v. Klapheke,* 967 S.W.2d 16, 18–19 (Ky.1998). "A motion for directed verdict admits the truth of all evidence which is favorable to the party against whom the motion is made." *National Collegiate Athletic Ass'n By and Through Bellarmine College v. Hornung,* 754 S.W.2d 855, 860 (Ky.1988), *citing Kentucky & Indiana Terminal R. Co. v. Cantrell,* 298 Ky. 743, 184 S.W.2d 111 (1944).
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> Clearly, if there is conflicting evidence, it is the responsibility of the jury, the trier of fact, to resolve such conflicts. Therefore, when a directed verdict motion is made, the court may not consider the credibility or weight of the proffered evidence because this function is reserved for the trier of fact. *National,* 754 S.W.2d at 860 (citing *Cochran v. Downing,* 247 S.W.2d 228 (Ky.1952)).
>
> In order to review the trial court's actions in the case at hand, we must first see whether the trial court favored the party against whom the motion is made, including all inferences reasonably drawn from the evidence. Second, "the trial court must determine whether the evidence favorable to the party against whom the motion is made is of such substance that a verdict rendered thereon would be 'palpably or flagrantly' against the evidence so as 'to indicate that it was reached as a result of passion or prejudice.'" If the answer to this inquiry is affirmative, we must affirm the trial court granting the motion for a directed verdict. *Id.* Moreover, "[i]t is well argued and documented that a motion for a directed verdict raises only questions of law as to whether there is any evidence to support a verdict." *Harris v. Cozatt, Inc.,* 427 S.W.2d 574, 575 (Ky.1968). Further, "a reviewing court cannot substitute its judgment for that of the trial judge unless the trial judge is clearly erroneous." *Bierman,* 967 S.W.2d at 18.

Daniels v. CDB Bell, LLC, 300 S.W.3d 204, 215 (Ky. App. 2009).

Here, absent an expansion of this Court's rulings in *Keel* and other cases, there was no dispute regarding the essential facts. Harrington admitted to signing a written consent that disclosed some level of information about the procedure. (VR 3/17/14

1:51:02 – 1:51:11; 1:57:05 – 1:57:12; 1:58:36 – 1:59:08). Her only attempted cause of action was for alleged lack of informed consent, wherein she would argue that she was not given sufficient, necessary or pertinent information. (VR 3/17/14 1:49:09 – 1:49:28 p.m.; *see also* Brief of Appellant, p. 3). She had no expert, however, to describe what this additional or other information should be under the applicable standard of care. (VR 3/17/14 2:13:50 – 12:14:15 p.m.; *see also* VR 3/17/14 3:10:20 – 3:10:22 p.m., A. at 5). The trial court determined that expert proof was necessary as a matter of law, and the plaintiff's counsel declared emphatically that no expert proof would be produced. Unless the court's substantive legal ruling was erroneous, the directed verdict should be upheld under the above standards.

Contrary to the Court of Appeals' opinion, Civil Rule 50.01 does not require, by its terms, "the introduction of some evidence at trial before granting a directed verdict." Rather, the first two sentences of Rule 50.01 merely affirm that a motion for directed verdict at the close of an opponent's proof does not waive the right to proceed if the motion is denied. CR 50.01. The rule provides:

> A party who moves for a directed verdict as the close of the evidence offered by an opponent *may offer evidence in the event that the motion is not granted, without having reserved the right* so to do and to the same extent as if the motion had not been made. *A motion for a directed verdict which is not granted is not a waiver* of trial by jury even though all parties to the action have moved for directed verdicts. ....

CR 50.01 (emphasis added). Thus, the language of CR 50.01 does nothing to inform the question presented here: it is a rule avoiding waiver of the right to present evidence; not a rule requiring the presentation of evidence before the motion can be made.

However, there is authority that does address the issue presented. As stated in *Lambert, supra,* there is a long line of authority in Kentucky and many other jurisdictions to the effect that the trial court can, with proper caution and under certain circumstances, direct a verdict after the plaintiff's opening statement. *See Samuels v. Spangler*, 441 S.W.2d 129 (Ky. 1969); *Co-De Coal Co. v. Jacobs*, 325 S.W.2d 78 (Ky. 1959); *Raco Corp. v. Edwards*, 272 S.W.2d 345 (Ky. 1954); *Brinton v. Motte*, 244 S.W.2d 480 (Ky. 1951); *Hill v. Kesselring*, 220 S.W.2d 858 (Ky. 1949); *Lambert v. Franklin Real Estate Co.*, 37 S.W.3d 770 (Ky. App. 2000); *see also Best v. District of Columbia*, 54 S.Ct. 487 (1934); *Malloy v. Providence Hosp.*, 296 F.2d 366 (D.C. Cir. 1961); *Morfield v. Kehm*, 803 F.2d 1452 (8th Cir. 1986). The Court of Appeals' assumption to the contrary is counter to well-established law.

The proof that led to the directed verdict was the judicial admission that there would be no expert proof offered. The predicate decision that made this admission dispositive was the trial court's determination, *in limine*, that expert proof would be necessary in this medical-negligence action. The Court of Appeals thus held that the lower court was not permitted to make this determination *in limine*, where the determination would lead to the entry of a directed verdict. However,, this Court has often acknowledged the trial court's responsibility to determine as a predicate matter if expert proof will be required. *See Blankenship v. Collier*, 302 S.W.3d 665 (Ky. 2010). This is an essential function of the trial court and is well within its discretion. *See Nalley v. Banis*, 240 S.W.3d 658, 661 (Ky. App. 2005) (citation omitted). In *Keel*, for example, the matter was resolved at the summary judgment stage. There is no prior authority, and no justification, for limiting the trial court's ability to make this

determination until after all of the evidence is received at trial. At that juncture, a ruling that an expert should indeed have been presented comes too late for the plaintiff to make her case, and - as the plaintiff's own counsel acknowledged - too late for the parties and the court to avoid unnecessary costs.

If Ms. Harrington had pursued her original medical malpractice claims alleging that Dr. Argotte had violated the standard of care in the manner of providing her treatment following her consent, and had announced in her opening statement that her sole identified expert would not be testifying after all, no one would suggest that the trial judge should have allowed her to put on her case without an expert before granting a directed verdict. The reason the matter is now before this Court is that the Court of Appeals disagreed with the trial court's determination that there is no exception to this expert testimony requirement when the plaintiff has received and signed a written disclosure. Specifically, the lower courts disagree as to the application of *Keel* to this case. This Court's ruling on that question should resolve the matter, regardless of the procedural timing of the verdict.

CONCLUSION

In addressing the substantive and procedural questions in this case, the Court of Appeals misconstrued the law and expanded an exception to the expert-witness rule in a way detrimental to the body of substantive law, and contrary to the trial court's authority to make *in limine* determinations concerning the need for expert proof. The evidence that Ms. Harrington signed a written disclosure and consent would have been the same at the end of her case-in-chief as it was at the end of her opening statement, because she judicially admitted these essential facts. The trial court correctly determined that expert

proof was indispensable to her claim as a matter of applicable law. Therefore, with Ms. Harrington admittedly having no expert proof, the court properly entered a directed verdict in Dr. Argotte's favor. The Court of Appeals' decision should be reversed, the trial court's verdict should be reinstated and this case should be dismissed with prejudice.

Respectfully submitted,
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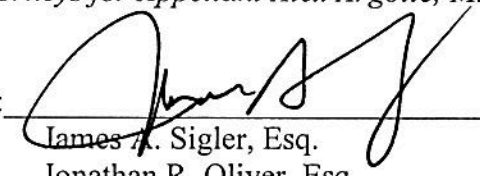
By: 

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